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No. 284

In the Supreme Court of the United States

OCTOBER TERM, 1960

INTERNATIONAL LADIES' GARMENT WORKERS' UNION, AFL-CIO, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD AND BERNHARD-ALTMANN TEXAS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (R. 129–139) is reported at 280 F. 2d 616. The Decision and Order of the National Labor Relations Board (R. 2–19) are reported at 122 NLRB 1289.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 1960. The petition for a writ of certiorari was filed on August 1, 1960, and was granted on October 10, 1960 (R. 141), 364 U.S. 811. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an employer renders unlawful support to a labor organization, in violation of Section 8(a) (1) and (2) of the National Labor Relations Act, when he recognizes it as the exclusive bargaining representative of all the employees in the bargaining unit at a time when the union in fact represents only a minority of those employees.

2. Whether the Board, as a remedy for that unfair labor practice, may properly order the employer to withhold exclusive recognition from the union and to stop giving effect to a contract requiring such recognition, until the union's majority status is established in a Board conducted election.

3. Whether a union which obtains exclusive recognition as the bargaining representative while representing only a minority of the employees thereby restrains the employees in the exercise of their right to select a bargaining representative or to refrain from so doing, in violation of Section 8(b)(1)(A) of the Act.

STATUTE INVOLVED

The pertinent statutory provisions appear in the Appendix to petitioner's brief.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Board found that the Company[1] violated Section 8(a) (1) and (2) of the Act by recognizing, and

[1] Bernhard-Altmann Texas Corporation is a Delaware corporation with its principal place of business in San Antonio, Texas, where it is engaged in the manufacture of knitwear for interstate commerce (R. 21).

executing and maintaining a contract with, the International Ladies' Garment Workers' Union as the exclusive bargaining representative of its employees, at a time when the Union did not in fact represent a majority of those employees. The Board also found that the Union violated Section 8(b)(1)(A) by executing and maintaining the same contract. The facts upon which these findings rest may be summarized as follows:

In October, 1956, the Union began to organize the Company's employees (R. 2, 22, 123–128). Between October, 1956, and September, 1957, the Union continued its organizational efforts, securing from employees authorization cards which designated the Union as the employees' bargaining representative (R. 22, 123–128). As of August 30, 1957, the critical date in this proceeding, the Union had not received authorization cards from a majority of the employees (R. 4–5).[2]

On July 29, 1957, in an action unrelated to the Union's organizational campaign, certain employees

[2] The record shows that, as of August 30, 1957, 280 employees were within the bargaining unit covered by the contract which the parties entered into (R. 46–47, 60, 82, 91–92, 112). In addition, the unit may have included some or all of another 120 employees laid off in the preceding month (R. 117, 41–43, 62). The Union had received authorizations from 158 employees, including 88 of the laid-off employees (R. 117, 123). If those 88 are excluded, the Union represented only 70 out of a unit of 280; if they are all included, the Union represented only 158 out of 368 or more. On these facts, the Board found, and the court below agreed (R. 4–5, 132–133), that the Union did not represent a majority of the employees on August 30, 1957. The petitioner in its brief does not challenge this finding (Br. 2, 53).

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struck in protest against a wage reduction in the Topping Department (R. 2, 22, 82). The Union, which represented many of the strikers, attempted to compose the differences. On August 30, 1957, following several meetings devoted to negotiation, the Union and Company signed a "memorandum of understanding" whereby the Company recognized the Union as exclusive bargaining agent for its production and shipping employees (R. 2–3, 22–23, 94–95). This memorandum provided, among other things, for an immediate termination of the strike, a wage increase, the checkoff of union dues, arbitration of disputes and the drafting of a formal contract containing the terms agreed upon (R. 3, 22–23, 94–95). Prior to the signing of the memorandum, the Company did not request an opportunity to examine the signed authorization cards, nor did the Union volunteer these cards (R. 3, 46, 120–122), which would have shown that the Union did not represent a majority of the employees (R. 4–5). Furthermore, at the time of the signing of the August 30 memorandum, the Company did not make the payroll records available, nor did it check the authorization cards against the payroll records subsequent to August 30 (R. 121).

On October 10, 1957, the Company and Union which had then acquired a "majority" (see *infra*, p. 32), signed a formal collective bargaining agreement which incorporated the terms of the "memorandum of understanding" (R. 3, 96, 60–61). This agreement reaffirmed recognition of the Union as sole bargaining agent for the Company's non-super-

visory production and shipping workers with certain specific exclusions (R. 3, 97).[3]

B. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board concluded that the Company, by recognizing the Union as the exclusive bargaining representative of the employees at a time when the Union lacked majority status, extended unlawful support to the Union in violation of Section 8(a)(2) of the Act, and interfered with, restrained and coerced the employees in the exercise of their rights under Section 7 to choose, or to refrain from choosing, a bargaining representative, in violation of Section 8(a)(1) of the Act (R. 8). The Board, one member dissenting, further concluded that the Union, by acquiring the status of exclusive bargaining representative at such a time, likewise restrained and coerced the employees in the exercise of their Section 7 rights, in violation of Section 8(b)(1)(A) of the Act (R. 8, 13-16).

The Board ordered the Company to cease and desist from supporting the Union and recognizing it as the exclusive bargaining representative of the employees in the specified unit, and to withhold such recognition until the Union demonstrated its majority status in a Board-conducted election. The

[3] The unit description conforms to the unit in the "memorandum of understanding" except that it was more specific in designating excluded employees. Excluded in the October 10 agreement were mechanics, machinists, designers, sample department employees, cafeteria employees, time study employees, plant clericals, guards, watchmen, truckdrivers, engineers, maintenance men, and janitors (R. 97).

Union likewise was ordered to cease and desist from acting as exclusive representative until its majority was shown by the election. The Board's order (R. 9–12) further directed the Company and the Union to cease and desist from giving effect to the "memorandum of understanding" or the contract of October 10, 1957, which had recognized the Union as the exclusive bargaining representative of the employees in the specified unit.[4] Finally, the order directed both parties to post notices.

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, speaking through Mr. Justice Burton (with Judge Fahy dissenting), affirmed the Board's finding and conclusions, and enforced its order (R. 129–139).

SUMMARY OF ARGUMENT

The national labor policy rests on the principles of freedom of choice and majority rule. Just as an employer may not defeat that policy by withholding exclusive bargaining status from a union which represents a majority, so may he not defeat that policy by extending exclusive bargaining status to a union which does not represent a majority. The latter action violates the basic principles as much as the former, for in both cases, the will of the majority of the employees (to unionize in one case, and not to unionize in the other) is frustrated by the employer's action. This occurred here when the Company rec-

[4] The Board's order, however, did not require the Company to vary or abandon any term or condition of employment established in the performance of the agreement (R. 9–10).

ognized the Union as exclusive bargaining representative at a time when the Union did not represent a majority.

I

That a grant of exclusive recognition to a minority union constitutes unlawful support of that union in violation of Section 8(a)(2) has been settled law since the early days of the Wagner Act. This Court early recognized that a grant of exclusive recognition gives a union "a marked advantage over any other in securing the adherence of employees." *National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 267. As recently as last Term this Court in two cases assumed, at least for purposes of the decisions therein, that the granting of exclusive bargaining status to a minority union was an unfair labor practice. *National Labor Relations Board* v. *Drivers Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, 280; *Local Lodge No. 1424* v. *National Labor Relations Board,* 362 U.S. 411, 413–414, n. 3, 429, 433. The courts of appeals have likewise viewed the law as "well-settled." Congress recognized this general rule in 1959, when it created a special exception for the construction industry.

II

The employer's belief that the union represented a majority is not relevant in determining whether he violated the Act in granting exclusive bargaining status to a union which in fact represented only a minority. The right of a majority not to be represented by a union it did not select is infringed to the

same extent whether the employer erroneously believes in the majority status or not. It should be noted, moreover, that the employer here did not even make a reasonable effort to find out whether the union in fact had a majority, which it could easily have done. The situation is not analogous to a refusal to bargain based on a mistaken belief that a union lacked a majority. In such a case the union can secure a prompt election to resolve the question of majority status. Here, however, the employer by granting exclusive bargaining status to a minority union has prevented the holding of a free election because he has already given that union "a marked advantage." *Pennsylvania Greyhound, supra.* The employer who erroneously but in good faith believes in a union's majority status is in substantially the same position under the law as an employer who erroneously but in good faith challenges a Board determination of the appropriate bargaining unit. In both cases the validity of the employer's belief, not his good faith, is tested before the Board and the courts; and, if he has erred, appropriate remedial relief (to extend exclusive recognition in the one case or to stop extending exclusive recognition in the other) is prescribed, but no other penalty attaches. When orderly Board and court processes establish that a union did not command the majority support necessary to exclusive bargaining status, a good faith belief in a contrary fact cannot justify permitting the mistakenly acquired status to continue.

III

The remedy provided by the Board corrects the situation by returning the parties to the status they occupied before the Union was unlawfully granted exclusive recognition. The employer is directed to withhold exclusive recognition unless and until the Union demonstrates its majority in a free election, conducted after the effects of the unfair labor practice have been dissipated. This remedy, conventional in cases of this nature, was approved as recently as *National Labor Relations Board* v. *District 50, United Mine Workers*, 355 U.S. 453.

IV

The employer's unlawful conduct in imposing a bargaining representative on a majority of the employees has as its counterpart the Union's unlawful conduct in acting as exclusive bargaining representative when not authorized to do so. The Union, like the employer, has thus unlawfully intruded on employee rights. This Court's decision in *Drivers, Local Union No. 639* (*Curtis Bros.*), *supra*, did not, we believe, limit union liability under the Act to acts of restraint and coercion accomplished by physical violence.

The holding that Section 8(b)(1)(A) did not make it unlawful for a minority union to picket in order to obtain exclusive recognition is explained by the fact that to prohibit such activity under the general language of Section 8(b)(1)(A) would have introduced a purely formal and untenable distinction between organizational and recognitional strikes and picketing, or else have prohibited all such organiza-

tional activity by a minority union even though the employer was not subjected to a demand that he recognize the union in violation of Section 8(a)(1). In the present case the Union, by joining in the execution of the collective agreement, went beyond such organizational tactics to participate in the coercion and restraint of the employees' rights, aiding the employer to violate Section 8(a)(1) and itself violating Section 8(b)(1)(A).

ARGUMENT

INTRODUCTION

Collective bargaining, the cornerstone of our national labor policy, is founded on the principles of freedom of choice and majority rule. Section 9(a) of the original Wagner Act, which was unchanged in this respect by the Taft-Hartley Act, provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees * * * shall be the exclusive [bargaining] representatives of all the employees * * *." In *J. I. Case Co.* v. *National Labor Relations Board*, 321 U.S. 332, 339, this Court noted that an individual is free "to vote against representation; but the majority rules * * *." Again in *Brooks* v. *National Labor Relations Board*, 348 U.S. 96, 103, this Court recognized that Congress placed "a nonconsenting minority under the bargaining responsibility of an agency selected by a majority of the workers."

In the present case the pattern was reversed. Notwithstanding Section 9, the Company granted exclusive bargaining status to a representative designated

or selected by only a minority of the employees.[5] The minority—not the majority—ruled. A non-consenting majority was placed under the bargaining responsibility of an agency selected by a minority. What occurred here, in short, was not effectuation, but frustration, of the underlying national policy—the imposition of a collective bargaining representative upon a majority which had not selected it. The question presented by this case is whether the Board and the court below correctly held that, by imposing an exclusive bargaining representative on the majority of the employees, the Company and the Union violated the Act. In the following pages we show that the Company violated Section 8(a) (2) and (1), and the Union, Section 8(b)(1)(A);[6] that the Company's mistaken belief that the Union had a majority at the time of recognition is no defense to the violation; and that the Board's order directing the Company to stop recognizing the Union as exclusive bargaining agent and to stop giving effect to the collective bargaining agreement requiring such recognition—unless and until the Union won a

[5] As shown n. 2, *supra*, p. 3, the Union, on August 30, 1957, when exclusive recognition was first extended to it, represented only 70 employees out of a unit of 280, or, at best, 158 out of a unit of 368. Nor is it relevant that the Union may have thereafter "signed up" additional employees (Pet. Br. 6, n, 2), for any subsequent "majority" would have been tainted by the August 30 unfair labor practices (see *infra*, p. 32).

[6] As we shall show (*infra*, pp. 34–39), the Section 8(b)(1)(A) finding, which is a relatively minor part of this case, is not inconsistent with *National Labor Relations Board* v. *Drivers, Local Union No. 639* (*Curtis Bros.*), 362 U.S. 274.

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Board election—is a reasonable exercise of the Board's remedial power.[7]

I. THE GRANT OF EXCLUSIVE RECOGNITION TO A MINORITY UNION VIOLATES SECTION 8(a) (1) AND (2) OF THE ACT

Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to "contribute * * * support" to a labor organization.[8] From the earliest days of the Wagner Act the courts have recognized that "once an employer has conferred recognition

[7] We emphasize that the violation here is the grant of *exclusive representative* status to a minority union. This case does not involve bargaining with a minority union *for its members only*, but bargaining with a minority as the exclusive representative of all the employees. Thus, both the August 30 memorandum of understanding and the subsequent formal contract recognized the Union "as the exclusive bargaining agent" for all of the employees in the unit involved (R. 94, 96–97). The discussion at pp. 60–108 of petitioner's brief, which attempts to distinguish "collective bargaining" from "exclusive recognition," therefore has no relevance to this case.

Similarly, there is no basis here for the suggestion that, but for the recognition of the Union, the strike would have proceeded indefinitely (Pet. Br. 33). The strike was not a strike for recognition (*supra*, pp. 3–4), and hence could have been settled without necessarily according exclusive representation rights to the Union. In any event, it may be noted that an unlawful agreement does not become valid because it ends a strike. An agreement to discharge non-members of a union might also end a strike, but would nonetheless violate Section 8(a) (3) and (1).

[8] This section prohibits support to any labor organization "irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope." Section 10(c) of the Act as amended in 1957. H. Rep. No. 245, 80th Cong., 1st Sess., p. 42; S. Rep. No. 105, 80th Cong., 1st Sess., pp. 12–13, set forth in I Leg. Hist. of the Labor Management Relations Act (G.P.O. 1948) 333, 418–419.

on a particular organization it has a marked advantage over any other in securing the adherence of employees" (*National Labor Relations Board* v. *Pennsylvania Greyhound Lines,* 303 U.S. 261, 267), for even "[s]light suggestions as to the employer's choice * * * may have telling effect among [employees]" (*I.A. of M.* v. *National Labor Relations Board,* 311 U.S. 72, 78). When an employer confers such exclusive recognition on a majority union he is not contributing unlawful support, for he is under a legal duty to recognize it.[9] But when, as here, he confers exclusive recognition on a union which does not represent a majority, the "marked advantage * * * in securing the adherence of employees" thus afforded the union falls within the interdiction of Section 8(a)(2) as it cannot be excused by a showing of a legal duty to recognize. Similarly, the grant of exclusive recognition in these circumstances would constitute an abridgment of the employees' Section 7 right "to bargain collectively through representatives of their own choosing" or "to refrain from" such activity, and hence violate Section 8(a)(1) which bars an employer from interfering with or restraining the exercise of Section 7 rights.

The proposition that an employer violates Section 8(a) (1) and (2) by granting exclusive recognition to a union which represents only a minority of the employees—which is the heart of this case—is deeply embedded in both the original philosophy and subsequent interpretation and administration of the Na-

[9] See Sections 8(a)(5) and 9(a).

tional Labor Relations Act. Under the Holmesian philosophy of free competition [10] it made little difference whether unorganized employees joined a union because they wished, because the employer forced them, or because the power of the union to deprive them of jobs left no viable alternative; the injuries were justified by the pursuit of self-interest. Prior to 1935 many unions followed the practice of "organizing employers" by securing recognition as the exclusive bargaining representative of all the employees regardless of the employees' wishes. But "top-down" organizing is plainly incompatible with the NLRA philosophy that the law should protect employees against interference by employers in union organization and the choice of representatives. "Top-down" organizing is equally inconsistent with the NLRA principle of majority rule. Consequently, although there were few direct challenges, the Board and the courts of appeals have from the beginning assumed that an employer's recognition of a minority union as the representative of all the employees violates rights guaranteed by Section 7.

Thus, in representation proceedings the Board has long taken the view that only a union chosen by a free majority of the employees in the bargaining unit may lawfully act for the entire unit. A contract signed with a minority union for its members only is not a bar to an election.[11] An election will

[10] *Vegelahn* v. *Gunter*, 167 Mass. 92, 106–107, 55 N.E. 1077, 1081 (dissenting opinion).

[11] *Pennsylvania Greyhound Co.*, 3 NLRB 622, 646; *Pressed Steel Car Co.*, 7 NLRB 1099, 1101, 1102; *Hillsdale Steel Products*

not be held where the number of employees in the unit is expanding, because the initial work force cannot truly represent all the employees and its choice of a representative will not therefore signify the wishes of a majority.[12] And signing a contract with a union designated by a majority of an initial work force too small to be representative is an unfair labor practice.[13]

The same principle underlies the interpretation of the phrase "concerted activities" in Section 7. Strikes and picketing designed to compel recognition of a minority union have been held not to be protected by Section 7 because their objective is to compel the employer to interfere with employees' rights by conduct violating Section 8(a)(1).[14]

Whenever the issue has been raised directly the Board has uniformly held that it is an unfair labor practice for an employer to recognize a minority union as the exclusive representative of all the employees

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Co., 30 NLRB 623, 625; *Solventol Chemical Products*, 113 NLRB 617, 618.

[12] *Lukas-Harold Corp.*, 44 NLRB 730, 732–733; *Coast Pacific Lumber Co.*, 78 NLRB 1245, 1246; *Westinghouse Electric Corp.*, 85 NLRB 1519, 1521; *Mrs. Tucker's Products*, 106 NLRB 533, 535.

[13] *Daniel Hamm Drayage Co.*, 84 NLRB 458, 460, enforced, 185 F. 2d 1020 (C.A. 5); *Guy F. Atkinson Co.*, 90 NLRB 143, enforcement denied on other grounds, 195 F. 2d 141 (C.A. 9). Cf. *Consolidated Builders, Inc.*, 99 NLRB 972, 975.

[14] *National Labor Relations Board* v. *Brashear Freight Lines*, 119 F. 2d 379, 382 (C.A. 8); *Hoover Co.* v. *National Labor Relations Board*, 191 F. 2d 380, 386–388 (C.A. 6); *National Labor Relations Board* v. *Electronics Equipment Co.*, 194 F. 2d 650, 652–654 (C.A. 2).

in a bargaining unit.[15] The courts of appeals have adopted a similar view.

In *Dixie Bedding Mfg. Co.* v. *National Labor Relations Board*, 268 F. 2d 901, 905 (C.A. 5), the court stated: "No question is raised as to legal principles involved, it being well settled that the grant of exclusive recognition to a union which lacks majority representation is unlawful." In *Glendale Mfg. Co.* v. *Local No. 520, ILGWU*, 283 F. 2d 936, 938, 940 (C.A. 4), petition for certiorari pending, No. 708, this Term, the court observed: "There are many cases which hold that employers committed unfair labor practices when they entered into agreements, affecting the employees generally, with a favored or minority union [footnote citing cases] * * * We conclude that this uncertified, minority union has no right to represent the employees and the employer no right to deal with it as the representative of the employees. Should they deal with each other on any such basis, they would invade the statutory right of the employees." And, in *National Labor Relations Board* v. *Electronics Equipment Co.*, 194 F. 2d 650 (C.A. 2), the court remanded the case to the Board to determine whether the employees sought exclusive recognition or members only recognition, for, in the court's view, the former would have rendered the activity unprotected as the union was only a minority group. It stated (194 F. 2d at 652–654):

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[15] *National Motor Bearing Co.*, 5 NLRB 409, 431–432, enforced on this point, 105 F. 2d 652 (C.A. 9); *Stein and Calder*, 46 NLRB 129, 130–131, 135; *Sunbeam Corp.*, 99 NLRB 546; *John B. Shriver Co.*, 103 NLRB 23, 38; *Safeway Stores, Inc.*, 111 NLRB 968, 974.

> * * * The employer argues (and the trial examiner held) that the sending of the letters was not a protected activity, because the letters had an unlawful purpose, i.e., to coerce the employer into recognizing Local 65 at a time when to do so would have been an unfair labor practice by the employer.
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> * * * it is very far from clear, on the evidence now before us, that the workers, by a strike or otherwise, would have pursued the aim of an exclusive bargaining contract if they had attained reinstatement. * * * As the Board noted, it is not certain that the letters demanded an exclusive bargaining contract for Local 65 at all. The writers might have had in mind something like a members-only contract to insure satisfactory reinstatement and working conditions for themselves alone * * *
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> * * * Consequently before calling the sending of the letters unprotected, because conducted for an illegal purpose, we will remand the case to the Board for the taking of additional evidence and the making of a finding of fact on the question of whether, in the context in which they were written, the letters showed that the employees intended in fact to pursue the aim of an exclusive-bargaining contract.

See also *National Labor Relations Board* v. *National Container Corp.*, 211 F. 2d 525, 536 (C.A. 2); *National Labor Relations Board* v. *Masters-Lake Success, Inc.*, 47 LRRM 2607, 2608 (C.A. 2), February 15, 1961; *District 50, United Mine Workers* v. *National Labor Relations Board*, 234 F. 2d 565, 569 (C.A. 4); *Elastic*

Stop Nut Corp. v. *National Labor Relations Board*, 142 F. 2d 371, 379 (C.A. 8). Some of these cases, to be sure, involved two unions competing for recognition, but the Act draws no distinction between the employer's duty to desist from supporting a union "when his employees are considering whether to unionize or not and when they are deciding to join one union or another." *National Labor Relations Board* v. *Corning Glass Works*, 204 F. 2d 422, 428 (C.A. 1). Granting exclusive recognition to a minority union is unlawful support whether its opponent is a competing union, or "no union."

This Court has recently accepted the underlying principle, at least *arguendo*, for the purposes of two decisions. In *National Labor Relations Board* v. *Drivers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274, the Court, although rejecting the Board's ultimate conclusion that picketing by a minority union to obtain exclusive recognition was within the scope of Section 8(b)(1)(A) (discussed more fully, *infra*, pp. 34–39, did not question the Board's underlying premise that the object sought by the picketing was an illegal one. Indeed, the Court, after quoting the Board as stating "the object of the Union's picketing in this case was to force the Company to commit an act prohibited by the statute itself," added the following explanation: "* * * that is, to recognize and contract with the Local although it was not the chosen representative of a majority of the Curtis Bros. employees" (*id.*, at 280). Moreover, it is noteworthy that Board Member Murdock whose dissenting view was sustained by the Court in *Curtis*, had acknowledged that, though the picketing itself was not unlaw-

ful, the *attainment* of the object sought thereby would be illegal (119 NLRB 232, 265):

> Only if at the moment of recognition a union has not yet succeeded in persuading a majority of employees to join it, is the employer's recognition of the union a violation of Section 8(a) (2) of the Act. And if this should occur the employees do not stand helplessly bound by a union not of their own choosing, but may file charges and obtain relief from the Board. From time to time the Board has cases where an employer has recognized a minority union and the Board has set aside contracts and enjoined the employer from recognizing it until certified. * * *

Similarly in *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, where the Court held that the limitations period imposed by Section 10(b) barred the Board from reaching a contract granting exclusive recognition and a union-security clause to a minority union, both the majority and the dissenting opinions noted that the grant of exclusive recognition to a minority union had often been held to be an unfair labor practice (at pp. 413–414, n. 3, 429, 433).

Congress, too, has consistently acted upon the same underlying assumption. As this Court noted in *Local Lodge No. 1424* v. *National Labor Relations Board*, 362 U.S. 411, 426, n. 16, "the issue of representation by minority unions was in the forefront of legislative concern," with respect to riders which Congress attached to the Board's appropriations in the years 1944 through 1948. The early riders precluded the Board from invalidating contracts in existence for

longer than three months regardless of whether or not the agreement was illegal because it was made with a company-dominated union, *a minority union,* or for any other reason. The riders were prompted by the *Kaiser Shipbuilding* cases, where the Board was proceeding to invalidate closed shop contracts which were entered into before a full work force had been hired and the union had secured a majority (cf. *National Labor Relations Board* v. *Guy F. Atkinson Co.,* 195 F. 2d 141, 144 (C.A. 9)). Congress, believing that the wholesale invalidation of such contracts would jeopardize war production, enacted the three-months time bar in order to "save" them from prosecution. See National Labor Relations Board, Ninth Annual Report (G.P.O. 1944), pp. 4–5. Had Congress not believed that the grant of exclusive recognition to a minority union violated the Act, obviously such special legislation would not have been required to sustain that action. Indeed, in the 1948 rider, Congress expressly limited its application to a majority union, "to get away from the so-called 'sweetheart' contract, which might be signed before the employees were actually organized" and to "give the protection of having the legal processes followed out." 93 Cong. Rec. 4499.

Similarly, after the enactment of the Taft-Hartley amendments, Congress, in 1951, gave consideration to proposals to permit unions and employers in the building and construction industry to enter into contracts recognizing the union as the exclusive bargaining agent before any employees had been hired on a particular job. It was pointed out that, because of

the special problems of the building and construction industry (discussed *infra*, p. 22), an exception to the Act's general prohibition against granting exclusive recognition to a union before it had acquired a majority was required, just as specialized treatment had been given to the *Kaiser* cases.[16]

Congress did not enact a building trades exception at that time, but it did in 1959.[17] In Section 8(f), added to the Act in the 1959 amendments, Congress provided that it should not be an unfair labor practice for an employer engaged primarily in the building and construction industry and a union to execute a bargaining agreement prior to the time the union has established its majority status.[18] This Section was en-

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[16] See Hearings before the Subcommittee on Labor and Labor-Management Relations of the Senate Committee on Labor and Public Welfare on S. 1973, 82d Cong., 1st Sess., pp. 31, 63.

[17] Between 1952 and 1959, however, Congress continued to consider the problem, bills being introduced which would have permitted the building trades and certain other industries to enter into "prehire" agreements. See, *e.g.*, S. 2650, introduced by Senator Smith, S. Rep. No. 1211, 83d Cong., 2d Sess.; S. 3974, introduced by Senators Kennedy and Ives, S. Rep. No. 1684, 85th Cong., 2d Sess. After extensive consideration, neither of these measures was enacted.

[18] In relevant part Section 8(f) reads: "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employees engaged (or who, upon their employment will be engaged) in the building and construction industry with a labor organization of which building and construction employees are members (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) because (1) the majority status of such labor organization has not been established under the provisions of section 9 of this Act prior to the making of such agreement, * * *."

acted to provide for the special conditions of the construction industry which necessitate the negotiation of "pre-hire agreements"—collective bargaining agreements between an employer and union prior to the hiring of employees and at a time when the union has not achieved majority status. Building contractors must often estimate overall production costs in bidding for construction work, and in order to do so it is necessary to negotiate a bargaining agreement including wage rates prior to hiring of workers or actual commencement of the job. It is clear, however, that Section 8(f) was intended as an exception to the existing law.

House Speaker Rayburn, commenting on the reasons for the construction industry exception, stated (105 Cong. Rec. 15541, II Leg. Hist. (1959) 1577, 1578: [19]

> Legislation authorizing prehire agreements in the construction industry is necessary because the industry cannot conform to the present law. The NLRA was written for mines, mills, factories, and similar establishments with a stable working force * * *. The [NLRA] incorporates the principle of majority rule in choosing a representative. Therefore, no representative can be chosen and no contract can be negotiated until the employer has hired a sufficient number of employees. "NLRB 16th Annual Report," page 149; *Bernhard-Altmann Texas Corp.*, 122 NLRB No. 148 (1959).

[19] "Leg. Hist. 1959" refers to the Legislative History of the Labor-Management Reporting and Disclosure Act of 1959 (G.P.O. 1959).

> Collective bargaining agreements must be negotiated in the construction industry before the employees are hired.
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> The result is that employers and unions in the construction industry have been in continuous violation of the NLRA ever since 1947. The legal validity of their collective bargaining agreements will remain questionable until Congress acts.

Similarly, Senator Goldwater, criticizing the proposals for a construction industry exception, stated:

> * * * The law now requires majority support for a union's becoming an exclusive bargaining representative. This provision eliminates the requirement of a showing of a majority * * *. [105 Cong. Rec. 7633, II Leg. Hist. (1959) 1273.]
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> * * * * *
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> * * * It permits employers and unions in that industry to sign collective bargaining agreements even though the union does not represent a majority of the employees in the unit (such agreement being presently unlawful) * * *. [105 Cong. Rec. 10104, II Leg. Hist. (1959) 1289.]

And, minority counsel to the Senate Labor Committee, in answering a question about the new law's provisions on prehire contracts, stated (105 Cong. Rec. A8360 (daily ed., September 24, 1959), II Leg. Hist. (1959) 1830):

> They gave the building trades what they have wanted for a long time and what, in fact, they are doing in violation of the law consistently all over the country.

> As I think I said earlier in this discussion, the basic principle of the law is that a union becomes the exclusive bargaining agent of employees if it represents a majority of them. That is, it's unlawful for an employer to bargain with a union if it does not represent the majority. And it is unlawful for both the employer and the union to enter into a collective-bargaining agreement, if the union doesn't represent a majority.
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> What was done in this bill is to give the building-trades unions and their employers in the building and construction industry the right to enter into such agreement without violating the law because of the peculiar needs of the construction industry.

Congressional understanding that the Act forbids employer recognition of a minority union as exclusive representative is further evidenced by the legislative history of Section 8(b)(7), also added by the 1959 amendments. That section, as this Court observed in *Curtis,* specifically reaches the type of picketing which the Board had sought to reach under Section 8(b)(1)(A), *i.e.,* picketing by a minority union for recognition (362 U.S. 274, 277, 291). One of the basic reasons for outlawing, under certain conditions, this kind of picketing was Congress' belief that its object was illegal. Thus, such picketing was described as "permitting an employer to be coerced into violating the law by forcing him to recognize a union which the majority of his employees do not wish either to join or to select as their bargaining representative." S. Rep. No. 187, 86th Cong., 1st Sess., p. 74, I Leg. Hist. (1959) 470.

In short, Congress, no less than the Board and the courts, has long understood that the precise conduct here involved—granting exclusive recognition to a minority union—was an unlawful act. We turn next to the petitioner's contention that the illegality of the recognition here is cured because of the employer's mistaken belief that the union enjoyed majority status. In a final section discussing those portions of the order which run against the Union, we shall show that there is no inconsistency between our interpretation of Section 8(a) (1) and (2) and the decision in *National Labor Relations Board* v. *Drivers, Local Union No. 639* (*Curtis Bros.*), 362 U.S. 274.

II. A GOOD FAITH BUT ERRONEOUS BELIEF THAT THE UNION HAD A MAJORITY IS NO DEFENSE TO THE CHARGE OF UNLAWFUL SUPPORT

As the court below and the Board observed (R. 5, 132) the employer in this case made no effort to check the union's authorization cards against the payroll, and took no other steps to investigate the truth of the union's assertion of majority. The petitioner nonetheless contends (Br. 28–60) that the employer had a good faith belief in the petitioner's majority, and that this belief constitutes a defense to the violation. We submit that, under established principles, the grant of unlawful support to a minority union violates the congressional command regardless of the absence of intent to violate.

The statutory language itself does not make scienter an element of the unfair labor practice prohibited by Section 8(a)(2), and there is no valid

justification for assuming that bona fide mistakes of fact or law furnish a defense to the violation. The unlawful act is *support* of a minority union. This support, once rendered, is an accomplished fact, and results *pro tanto* in an invasion of employee rights under the Act. The quality and character of the support are neither enhanced nor diminished by the employer's mistaken belief in the union's majority status. The right of a majority not to be represented by a union it did not select is infringed no less when the employer erroneously believes in the majority status than when he does not. Accordingly, there is every reason to apply to Section 8(a)(2) the settled principle that prohibited conduct cannot be justified by "good faith" (*McQuay-Norris Mfg. Co.* v. *National Labor Relations Board*, 116 F. 2d 748, 752 (C.A. 7)), nor by the absence of evil "animus or desire" (*National Labor Relations Board* v. *Gluek Brewing Co.*, 144 F. 2d 847, 853 (C.A. 8)), nor by the "serious dilemma" of the employer's position (*National Labor Relations Board* v. *Star Publishing Co.*, 97 F. 2d 465, 471 (C.A. 9)), nor by "good business reasons" (*Allis-Chalmers Mfg. Co.* v. *National Labor Relations Board*, 162 F. 2d 435, 440 (C.A. 7)); in short, a statutory infraction is not condoned by the worthiness of the "motive" (*National Labor Relations Board* v. *Illinois Tool Works*, 153 F. 2d 811, 814 (C.A. 7); *National Labor Relations Board* v. *Perfect Circle Co.*, 162 F. 2d 566, 573 (C.A. 7)). See also the detailed discussion of "good faith" in *National Labor Relations Board* v. *Industrial Cotton*

Mills, 208 F. 2d 87, 91–92 (C.A. 4), certiorari denied, 347 U.S. 935.

Stated otherwise, the worst that can befall an employer who mistakenly recognizes a minority union as exclusive representative is an order that he cease such recognition unless and until the union's majority is established in a Board election.[20] Such an order entails no particular hardship on any of the parties; indeed, the employer in this case did not bother to resist its enforcement either here or in the court below. The union, too, unless it believes that it cannot command majority support in a free election, can have no objection to putting its claim of majority to a fair test. The contrary result would permit a good faith belief in a fact to create the fact itself. To borrow petitioner's example (Br. 44), the executor of an invalid will may receive compensation if he acted in good faith, but all his good faith cannot validate the will. So here, once the fact of lack of majority is established, a good faith belief in a contrary fact cannot justify permitting the mistakenly acquired status to continue.

The petitioner urges (Br. 31–32) that the "good faith" standard, applicable as a defense to a refusal to recognize a majority union, should be equally applicable as a defense where exclusive recognition is accorded a minority union. But, like the contention in *Brooks* v. *National Labor Relations Board*,

[20] That election, of course, would not be held until after there had been compliance with the Board's remedial order for a sufficient period of time, normally 60 days, to dissipate the effects of the prior unlawful recognition.

348 U.S. 96, 103–104, that informal methods of repudiating a bargaining agent should be as available as informal methods of selecting one, "This is to make situations that are different appear the same." To be sure, an employer who has a good faith doubt as to the union's majority status may, without violating the obligation imposed by Section 8 (a)(5) and (d) to bargain collectively with the representative of his employees, decline to recognize the union until its status is established in a Board election, even if the union in fact enjoys majority support at the time of the refusal. This result is necessary in order to accommodate Section 9(c), which provides an election procedure for the speedy resolution of representation questions in cases where a genuine doubt exists, and, furthermore, awaiting the outcome of that procedure involves no impairment of employee rights. In short, the election provides a reliable way in which the employer may obtain the facts, so that he need not act at his peril. However, as to other matters which cannot be resolved by the election procedure—such as whether a subject is "wages or other terms or conditions of employment" and thus within the area of mandatory bargaining—the employer's good faith, but mistaken, belief that the matter is not encompassed does not excuse his refusal to bargain about it.[21]

A good faith, but mistaken, belief that the union represents a majority of the employees is analogous

[21] See *National Labor Relations Board* v. *Wooster Division of Borg-Warner Corp.*, 356 U.S. 342; *Inland Steel Company* v. *National Labor Relations Board*, 170 F. 2d 247 (C.A. 7), certiorari denied, 336 U.S. 960.

to the latter situation. Contrary to the view of the dissenting judge in the court below (R. 139), where an employer grants exclusive recognition to a union which in fact represents only a minority, the error cannot be corrected by a prompt election, for the recognition gives the minority union "a marked advantage" in "securing the adherence of employees" (*Pennsylvania Greyhound, supra,* 303 U.S. at 267), and hence prevents a free expression of the employees' choice. Accordingly, the conditions which make it possible to give effect to the employer's good faith when he withholds recognition though the union actually has a majority, do not exist in the converse situation here.[22]

The petitioner's further contention (Br. 33–41) that, if the good faith standard is not applied, collec-

[22] The petitioner errs in suggesting (Br. 31–33) that the Board has failed to apply the good faith standard in the same way as it has in the past. The cases cited by petitioner, holding that the employer violates Section 8(a)(5) of the Act by demanding proof of the union's majority when he does not have a good faith doubt concerning it, all involve a situation where the union in fact represents a majority of the employees. This is entirely different from the situation here, where the union did not actually have a majority. For, where the union is in fact the majority representative, Section 8(a)(5) imposes an obligation on the employer to recognize and bargain with it, which obligation is suspended only if there is a question concerning the majority sufficient to invoke the Section 9(c) election procedure (see pp. 27–28, *supra*). But, where the union does not actually have a majority, the employer's good faith cannot supply one; there is thus no obligation to recognize the union as the exclusive representative, and, indeed, were the employer to do so, he would, no matter how well intentioned, abridge the right of the majority to be free of such a representative absent their consent.

tive bargaining will break down, is based on a misconception both of the problem and of the remedy.

In the first place, if an employer, unlike the one here, takes steps to verify the union's claim and ascertains that the union is in fact representing a majority, nothing in the Board decision here would preclude him from recognizing the union without a Board election. "A Board election is not the only method by which an employer may satisfy itself as to the union's majority status." *United Mine Workers* v. *Arkansas Oak Flooring Co.*, 351 U.S. 62, 72, n. 8.

Moreover, as shown, *supra*, even if the employer grants recognition and the union actually lacks a majority, no penalty attaches to a violation of Section 8(a)(2). The statutory scheme often requires a party to commit a "technical" unfair labor practice in order to test the validity of his position. Thus, an employer who challenges a unit determination, or the validity of an election, or the Board's jurisdiction must, under the law, refuse to bargain and run the risk of an unfair labor practice finding and court decree in order to secure judicial review testing the correctness of his contention. *A.F. of L.* v. *National Labor Relations Board*, 308 U.S. 401; *Norris* v. *National Labor Relations Board*, 177 F. 2d 26 (C.A. D.C.). In the same manner an employer who in good faith accepts a union's majority claim may have his position tested before the Board and the courts in an unfair labor practice proceeding. If the employer is proved wrong, either in failing to recognize or in recognizing, he is subjected to a remedial order tailored to the facts as established (*i.e.*, to bargain if the union

had a majority in an appropriate unit, or to stop bargaining if it did not), but no other penalty results.

For these reasons, the employer's good faith belief in the union's majority status has no bearing on whether his grant of exclusive recognition to a minority union constitutes unlawful assistance,' within the meaning of Section 8(a)(1) and (2) of the Act. We turn, therefore, to consider the propriety of the remedy prescribed in this case.

III. THE BOARD PROPERLY ORDERED THE COMPANY TO STOP RECOGNIZING THE UNION AND GIVING EFFECT TO ITS CONTRACT PENDING THE UNION'S ESTABLISHING ITS MAJORITY IN A BOARD ELECTION

The Board's remedial order, directs the Company to stop giving effect to its contract with the Union, which recognized the Union as the exclusive representative of its employees, and to withhold recognition from the Union unless and until the Union demonstrates its majority status in a Board election. The order is in the conventional form for cases of unlawful employer assistance, as approved by this Court as recently as *National Labor Relations Board* v. *District 50, United Mine Workers,* 355 U.S. 453. The gravamen of the offense here was extending exclusive recognition to a minority union, and a remedial order which calls for the cessation of such recognition unless and until the union attains proper status is thus "adapted to the situation which calls for redress" (*National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 348).

Both the petitioner and the dissenting judge in the court below (Br. 76–79, R. 139) are of the view that the employees should be given an opportunity to re-

pudiate the Union or to select another bargaining representative. But the election they envisage would be conducted at a time while the Union still enjoyed the fruits of unlawful support. Enforcement of the Board's order is necessary to wipe out the consequences of the unfair labor practice, and the election contemplated by the Board can thereafter be conducted in an atmosphere permitting full freedom of choice. See *District 50, United Mine Workers, supra,* 355 U.S. at 463; p. 27, n. 20, *supra.*

Nor is the petitioner aided by pointing (Br. 109–110) to the majority it possessed at the time of the October, 1957, contract. The majority then acquired was achieved after the employer had unlawfully conferred exclusive recognition upon it. The purpose of the Board's order, however, is to restore as nearly as possible the status existing at the time of the unfair labor practice. Just as the Board may order an employer to grant exclusive recognition to a union which had a majority but lost it after unfair labor practices were committed, so may the Board order an employer to stop recognizing a union which had no majority but attained it after the commission of unfair labor practices. Cf. *Franks Bros. Co.* v. *National Labor Relations Board,* 321 U.S. 702, 703–705. Any other result would permit a wrongdoer to profit by his own wrong. This is particularly true here where the underlying offense, exclusive recognition of a minority union, is calculated to assist it in obtaining employee support.

The petitioner's attack on the part of the order requiring the employer to cease giving effect to the

contract with the union is equally without merit. The situation here is distinguishable from that in *Consolidated Edison Co.* v. *National Labor Relations Board,* 305 U.S. 197, 236–238, relied on by petitioner (Br. 111–113). The Court there observed that "no basis [existed] for a finding that the contracts * * * were a consequence of the unfair labor practices found by the Board or that these contracts in themselves thwart any policy of the Act or that their cancellation would in any way make the order to cease the specified practices any more effective." 305 U.S. at 236. Precisely the opposite is true here: the execution of the August agreement was an unfair labor practice, the exclusive recognition there granted a minority union thwarted the statutory policy of majority rule, and cancellation of that recognition is the heart of the order. This Court in *Edison* was careful to note (305 U.S. at 236–237) that "the contracts [did not] make the [unions] exclusive representatives for collective bargaining." The contracts here did make the Union the *exclusive* bargaining representative and that is the unfair labor practice here involved. See also *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 361–367. Nor is the contract portion of the Board's order inconsistent with *National Labor Relations Board* v. *Gaynor News Co.,* 197 F. 2d 719, 724 (C.A. 2), affirmed, 347 U.S. 17 (Br. 114). There the union unquestionably represented a majority, but it had made an unlawful union security agreement. The court set aside the unlawful clause, but did not require a withholding of recognition from the union as that would have deprived the

majority of their bargaining rights. Here the unlawful clause is the clause granting exclusive recognition, and in practical effect this is the clause set aside by the Board's order, for the order specifically permits employees to retain substantive rights under the contract (R. 9–10). In short, just as in *Gaynor* preservation of majority rule led the court not to set aside the recognition features of the contract, so here preservation of majority rule requires a setting aside of those provisions pending an election.

IV. THE BOARD PROPERLY FOUND THAT THE UNION BY OBTAINING EXCLUSIVE RECOGNITION WHILE REPRESENTING ONLY A MINORITY OF THE EMPLOYEES VIOLATED SECTION 8(b)(1)(A) OF THE ACT

We have shown that the Company violated Section 8(a)(2) and (1) by granting exclusive recognition to a minority union, that the Company's good faith in so doing is irrelevant, and that the Board properly ordered the Company to withdraw exclusive recognition unless and until the Union wins a Board election. We turn finally to the related question of whether the Union violated Section 8(b)(1)(A) by obtaining recognition as the exclusive representative of all the employees in the unit even though it was only a minority choice. This question may properly be characterized as minor because if the Board's position is sustained vis-à-vis the employer, the practical consequences of the case are the same, whether or not a decree is also entered against the Union. It is doubtless for this reason that the Union devotes only two pages (Br. 72–74) to the issue.

Section 8(b)(1)(A) prohibits restraint and coercion of employees in the exercise of Section 7 rights. These rights include the right to self-organization and to collective bargaining through representatives of the employees' choosing, and the right to refrain from such activity. The law is settled that, when an employer unlawfully supports a union, he not only violates Section 8(a)(2) but also infringes on his employees' Section 7 rights, in violation of Section 8(a)(1). *Art Metals Constr. Co.* v. *National Labor Relations Board,* 110 F. 2d 148, 150 (C.A. 2); *National Labor Relations Board* v. *Newark Morning Ledger Co.,* 120 F. 2d 262, 265, n. 1 (C.A. 3). Accordingly, as shown, *supra,* pp. 12–25, the employer, by imposing a representative upon the majority of the employees, not only violated Section 8(a)(2) but also Section 8(a)(1). Since Section 8(b)(1)(A) was intended to impose on unions, wherever applicable, the same restrictions already imposed on employers respecting intrusion on employee rights,[23] a union which joins an employer in imposing unlawful restraint must be held to violate Section 8(b)(1)(A), just as the employer violated Section 8(a)(1).

There is nothing to the contrary in *National Labor Relations Board* v. *Drivers, Local Union No. 639 (Curtis Bros.)*, 362 U.S. 274. The Court held that Section 8(b)(1)(A) did not prohibit peaceful picketing by a minority union to obtain recognition, and in so doing expressed the view that "§ 8(b)(1)(A) is a

[23] See S. Rep. No. 105, 80th Cong., 1st Sess., p. 50 (Supp. Views), I Leg. Hist. (1947) 456; 93 Cong. Rec. 4432, 4435, 4436, II Leg. Hist. (1947) 1199, 1204, 1207.

grant of power to the Board limited to authority to proceed against union tactics involving violence, intimidation, and reprisal or threats thereof—conduct involving more than the general pressures upon persons employed by the affected employers implicit in economic strikes" (at p. 290). We do not believe that, by this language or holding, the Court intended to place the union conduct here outside the scope of Section 8(b)(1)(A).

The determination that Section 8(b)(1)(A) should not be read to outlaw picketing by a minority union to obtain exclusive recognition entailed considerations not pertinent to the present case. In the *Curtis* situation it could be argued that it was illogical to make it unlawful for an employer to extend exclusive recognition to a minority union and not also proscribe a union from exerting economic pressure to attain that illegal object. The fault in the logic is that the line between minority picketing for recognition and minority picketing for organizational purposes is purely verbal; *i.e.*, the illegal object would disappear if the union were to forego any demand upon the employer or carefully to phrase its demand in terms of appealing to the employees to join so that recognition might be sought in the future, if majority support were obtained. The real issue in determining whether minority picketing for recognition should be outlawed really is whether, and to what extent, labor unions should be permitted to use peaceful picketing as a technique for organizing employees. This issue, in turn, goes to the very heart of the problem of balancing the relative power of employers and labor unions. The

Court, in *Curtis*, concluded that Congress would not have undertaken to enter this difficult area with a vague provision like Section 8(b)(1)(A). The legislative history of Section 8(b)(1)(A) also indicated that Congress did not intend thereby to interfere with the legitimate organizational techniques of unions, that Congress had dealt with the problem of picketing for recognition to a limited extent only in Section 8(b)(4)(C), and that Section 13 preserved the right to strike (and to engage in peaceful picketing) unless the Act specifically provided otherwise (see 362 U.S. at 282–288).[24]

These considerations do not apply to an employer's actual grant of exclusive recognition to a minority union. Proscribing the employer interference and any union complicity, unlike proscribing picketing to secure exclusive recognition, does not threaten traditional organizational weapons, nor does Section 13 caution against such a proscription. Thus, in the case of the conduct here, Section 8(b)(1)(A) may be given the equivalence with Section 8(a)(1), which it was generally intended to have (*supra*, p. 35), and consequently be interpreted to proscribe the action of a minority union in obtaining recognition as the employees' exclusive bargaining representative.[25]

It may be added that, it was understood before

[24] For a more elaborate exposition of the philosophy underlying this analysis and a discussion of its influence upon the 1959 amendments, see Cox, *Law and the National Labor Policy*, pp. 10–15, 23–31.

[25] *Miami Copper Co.*, 92 NLRB 322, 324, 340–341, relied on by petitioner (Br. 73) is like *Curtis*, *i.e.*, the union resorted to strike action to accomplish an unlawful aim.

Curtis that Section 8(b)(1)(A) was not limited to physical coercion of employees to forego their Section 7 rights, but included direct economic pressure as well—such as oral threats by union officials to employees that refusal to support the union would result in job loss,[26] or a contract which illegally required union membership as a condition of employment.[27] A contract granting exclusive recognition to a minority union imposes just as effective and immediate a restraint on the employees' Section 7 rights as does an oral threat of job loss or a contract requiring union membership as a condition of employment. For, with the execution of the contract, an employee is no longer free to bargain individually with the employer but must be represented by, and accept the bargain negotiated by, an agent who was not selected by a majority of the employees. And the union, as we have pointed out above, thereby secures an unwarranted advantage in soliciting future support.

For these reasons, the holding in *Curtis* is not dispositive of the issue whether the union action here violated Section 8(b)(1)(A). As the court below observed (R. 136):

> The instant cases involve much more direct interference and restraint of §7 rights than did the *Curtis Bros.* case. In the instant cases the recognition of the minority union is a *fait*

[26] See *National Labor Relations Board* v. *Local 404, Teamsters*, 205 F. 2d 99, 101–102, n. 2 (C.A. 1); *Lane* v. *National Labor Relations Board*, 186 F. 2d 671, 674 (C.A. 10).

[27] See *Communications Workers* v. *National Labor Relations Board*, 215 F. 2d 835, 837–838 (C.A. 2); *National Labor Relations Board* v. *Philadelphia Iron Works*, 211 F. 2d 937, 944 (C.A. 3).

accompli depriving the majority of employees of their guaranteed right to choose their own representative. In the *Curtis Bros.* case the issue was not whether the recognition of the minority union as exclusive bargaining representative was a violation of the statute. It was only whether the preliminary picketing seeking to gain members and recognition was a violation of § 8(b)(1)(A).[28]

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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[28] If we are correct in our view that the Union violated Section 8(b)(1)(A) by obtaining exclusive recognition when it did not represent a majority of the employees, the provisions of the Board's order requiring the Union to cease acting as such representative and giving effect to the contract, until its majority is demonstrated in a Board election (R. 11), are appropriate for the same reason that a comparable sanction was proper in the case of the employer (see p. 31–34, *supra*).

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